LOH BEE TUAN

v.

SHING YIN CONSTRUCTION & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CHARLES NC HO J
[SUIT NO: K 263-1989]
12 MARCH 2002

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Non-disclosure of fact that property was charged - Whether tantamount to fraudulent misrepresentation - Whether there was intention to transfer clean title to purchaser - Whether 3rd defendant personally liable*

LEGAL PROFESSION: *Retainer - Duties to client - Whether there was an implied retainer between plaintiff and 4th defendant - Whether 4th defendant acted as solicitor for plaintiff - Whether 4th defendant breached duty as plaintiff's solicitor*

TORT: *Misrepresentation - Negligent misrepresentation - Whether plaintiff relied on representation - Whether plaintiff suffered loss as a result thereof - Whether 4th defendant liable*

The plaintiff contracted with the 1st defendant for the purchase of a shop-house unit, and although the plaintiff had fully paid the purchase price, the 1st defendant failed to transfer the shop-house unit to her name due to its inability to redeem the property which was charged to Sabah Bank Berhad. Subsequently, the shop-house unit was put up for sale by Sabah Bank Berhad resulting in this action by the plaintiff against the defendants.

The plaintiff alleged that the 3rd defendant (the 1st defendant's director), had authorised the 1st defendant to commit fraudulent misrepresentation by concealing the fact that the property was charged to Sabah Bank Berhad, and for giving warranties in respect of the alleged clean title of the property. The plaintiff also averred that the 4th defendant had acted as a solicitor for her, but had breached the duty of care and skill ordinarily required of a solicitor in such a position by failing to exercise all due professional care, skill and diligence in or about the said sale and purchase transaction.

Held:

[1] The 3rd defendant must have known that the plaintiff would act on the false representation as no reasonable purchaser would ever execute a sale and purchase agreement for property if he or she knew that it was encumbered heavily with five memoranda of charges. Furthermore, from the 3rd defendant's actions in further encumbering the said property after signing the sale and purchase agreement, it could only be inferred that there was never an intention to discharge the various charges and present a clean subsidiary title to the plaintiff. Therefore, the 3rd defendant should be held personally liable for authorising the 1st defendant to commit the fraudulent misrepresentation. (p 51 f-i)

[2] The 4th defendant acted or at least purported to act as the plaintiff's solicitor, and although there was no written evidence to support a retainer between the plaintiff and the 4th defendant, the existence of a retainer could be implied from the facts of the case. Consequently, under the terms of the implied retainer in the sale and purchase agreement, the 4th defendant had breached his duty as a solicitor to the plaintiff as he had acted for the developer and the end financier without any regard whatsoever for the interest of the plaintiff. (p 53 h & 57 a)

[3] The 4th defendant had falsely stated that the title to the property was clean when in fact it was heavily encumbered, and as a result, the plaintiff, who had relied on the false representation, suffered loss. Therefore, even if a retainer could not be implied on the facts of the case, the 4th defendant would be liable under tort. (p 57 b, g)

[Judgment for the plaintiff.]

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantra Timur Sdn Bhd & Ors [1997] 4 CLJ 437 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

British Thomson-Houston Co Ltd v. Sterling Accessories Ltd [1924] All ER Rep 294 ***(refd)***

C Evans & Sons Ltd v. Spritebrand Ltd & Anor [1985] 2 All ER 415 ***(refd)***

Dato' Seri Au Ba Chi v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Ex parte Vicnandan Maria Dass [2000] 3 CLJ 808 ***(refd)***

Groom v. Crocker [1938] 2 All ER 394 ***(refd)***

HL Hedley Byrne & Co v. Heller & Partners [1963] 2 All ER 571 ***(refd)***

Letchemy Arumugam v. Annamalay [1982] 2 MLJ 198 ***(refd)***

Midland Bank Trust Co Ltd & Anor Hett, Stubbs Hett & Kemp (a firm) [1978] All ER 582 ***(refd)***

Muoat v. Clark Boyce [1992] 2 NZLR 559
Neogh Soo Oh & Ors v. G Rethinasamy [1984] 2 MLJ 126
Rainham Chemical Works Ltd v. Belvdere Fish Guano Co Ltd [1921] All ER 48
Ross v. Caunters [1979] 3 All ER 3rd edn 580
Wah Tat Bank Ltd v. Chan Cheng Kum [1975] 2 All ER 257

Legislation referred to:
Rules of the High Court 1980, O. 77 r. 9
Sabah Advocates (Practice and Procedure) Rules 1988, r. 5(a)

Other source(s) referred to:
Clerk & Lindsell on Torts, 17th edn, para 14-01
Halsbury's Laws of England, 3rd edn, vol 36, para 87

For the plaintiff - Marina Tiu; M/s Yap Chin & Tiu
For the defendants - Norbert Yapp Chu Chon; M/s Jayasuriya Kah & Co

Reported by Suresh Nathan

JUDGMENT

Charles NC Ho J:
The plaintiff in this action entered into a sale and purchase agreement with the 1st defendant on 6 September 1985, for the purchase of a shop house unit developed and built by the 1st defendant. Even though the plaintiff had fully paid the purchase price partly from her own money and partly from the loan she had taken from a credit company called S.Y. Jie Credit Sdn Bhd, the 1st defendant failed to transfer the said shop house unit to her name. Apparently the failure or inability of the 1st defendant in transferring the shop house unit to her was because the property was charged to the Sabah Bank and the 1st defendant was unable to redeem it. Subsequently the shop house unit purchased by the plaintiffs and the other unsold units were put up for sale by Sabah Bank pursuant to the charges with the bank. The plaintiff now brings this action to claim against all the defendants jointly and severally the sum of RM208,587 (which includes the purchase price and other expenses), damages, statutory interest, and costs.

At the outset of the trial counsel for the plaintiff informed the court that judgment in default had been entered against the 1st defendants' company which had since been deregistered by the registrar of company and the plaintiff is not proceeding against 2nd defendant who had passed away.

Facts

The agreed facts are briefly these: The plaintiff agreed to purchase from the 1st defendant the property known as 'Ground Floor, Lot A, Wisma Shing Yin (hereinafter called the 'subject property') for the purchase price of RM170,000. Upon signing of the sale and purchase agreement on 6 September 1985, the plaintiff was given possession of the subject property. The plaintiff was granted a loan of RM102,000 by SY Jie Credit Sdn Bhd towards the purchase of the subject property and a loan agreement dated 6 September 1985, was executed between the said credit company and the plaintiff. The sale and purchase agreement, the loan agreement together with the memorandum of charge in escrow was prepared by and executed in the office of the 4th defendant's legal firm and the legal fees and stamp duty paid by the plaintiff to the 4th defendant amounted to RM2,673. The 3rd defendant was at all material times a registered shareholder (204000 shares) and director and company secretary of the 1st defendant's company as well as the company secretary of the S.Y. Jie Credit Sdn Bhd.

The land upon which the subject property was erected had not been converted to commercial use and was charged to Sabah Bank under a number of memorandum of charges registered with the land office on various dates both before and after the execution of the sale and purchase agreement. The Sabah Bank in exercise of its rights as chargee sold the said land including the subject property on 28 May 1993 to one Datin Rupiah bte Bachee Khan.

Oral Evidence

According to the plaintiff (PW1) who is a 56 year old hawker the events which led to the signing of the sale and purchase agreement and the formalisation of the loan documents are these: After the plaintiff saw **an advertisement** put up by the 1st defendant in the newspaper for the sale of completed shop houses she and her husband (PW2) went to the office of the 1st defendant. There they met one Mr. Jie Shing Yin (2nd defendant) who dealt with them. When they indicated that they were interested in Lot A Mr. Jie told them that it had already been booked by someone else but he could talk to that person to get that lot for the plaintiff. Mr. Jie also told them that he would arrange for end financing and get a lawyer for them. As Mr. Jie was speaking in Cantonese and the plaintiff did not understand Cantonese, the conversation in the 1st defendant's office was between her husband who understood Cantonese very well and Mr. Jie. These details were given to her by the husband later. A few days later the plaintiff heard from her husband that Lot A was available. The plaintiff and her husband then went to the law firm of Ronny Cham and Co. to sign the sale and purchase agreement and loan agreements. The plaintiff stated that when she signed those documents she truly believed that Mr. Ronny Cham was acting for her. She said that she noticed that cl. 6 of the sale and

purchase agreement also said something to that effect. No one told her that Ronny Cham & Co. was only acting for the developer and no one advised her to find a lawyer. At that time, she also had no reason to suspect that there was anything wrong with the transaction. After she signed the documents the plaintiff said that her husband issued a cheque to cover the deposit and the legal fees (RM6,800 and RM2,673 respectively). The plaintiff further testified that she later heard rumours that something was wrong with the developer. Her husband then approached the law firm of Alex Pang & Co. who told them that that shop lot was charged to Sabah Bank. During cross examination, counsel for defendants put to the plaintiff that she took a set of the sale and purchase agreement from 1st defendant's office. She denied it. It was also put to her that Mr. Jie Shing Yin did not say that he would find a lawyer for her. She strongly denied this also. She reiterated that Mr. Jie Shing Yin said he would help her find a lawyer.

PW2, the husband of the plaintiff gave substantially the same evidence and he corroborated his wife on several material points. He said when they first went to the office of the developer they met one Mr. Wan who brought them to see his boss, one Mr. Jie Shing Yin. Mr. Jie Shing Yin told him that he could arrange a lawyer and a loan for his wife. Mr. Jie Shing Yin also told them that he would call in a few days when unit A which the plaintiff was interested in becomes available. PW2 said two days later Mr. Wan called and said that that Lot A was available. PW2 went there with his wife the next day to the developer's office where Mr. Wan took down the personal particulars of his wife and told them that he would arrange the loan and the lawyer. A few days later Mr. Wan called PW2 and gave him directions to go to Ronny Cham and company's office. PW2 said that when they went to Ronny Cham's office, Mr. Wan was already there and a clerk brought in the sale and purchase agreement and loan agreement for signing. PW2 believed that that Ronny Cham was also acting for his wife as it was stated in the agreement. He said no one in Ronny Cham's office told them that Ronny Cham was not acting for them. No one advised them to get independent legal advice. They were not warned that that there were charges against the title. He said that they would not have signed the agreement without consulting a lawyer if they knew the title was charged. He also said that the credit company arranged by the developer belonged to the same people. He only realised that when Mr. Wan who he met in the developer's office came to collect the installments. During cross examination PW2 denied that they were given a set of documents to be brought home for study. He also denied that he never regarded Ronny Cham as his lawyer.

The plaintiff also called as a witness one Mr. Kong Yun (PW3) who also bought a shop house from the 1st defendant. This witness said that when he first went to the 1st defendant's office he met one Mr. Wan who showed him the shop houses. He decided to buy one of the shop houses. Later on he was introduced to Mr. Jie Shing Yin who told him that a lawyer would be arranged for him. A loan was also arranged for him with S.Y. Jie Credit Sdn Bhd.

PW4, a lawyer who has been in practice for about 20 years predominantly in the conveyancing field was called by the plaintiff to give evidence as to the prevailing conveyancing procedures. His expertise was not challenged nor was he cross examined by counsel for the defendant. PW4 said that his firm had occasion to act for housing developers. He said that when a purchaser comes to his firm to sign a sale and purchase agreement, he would indicate that he was only acting for the housing developer. Otherwise a purchaser would normally assume that he was acting for them as well. This is because the purchaser is the person normally paying the legal fees. If he acted for the end financier, redemption arrangement would be made in respect of existing charges so that the end financier is protected. He said normally the end financier would release loan money only on the advice of their solicitors.

Since Jie Shing Yin (2nd defendant) had passed away the defence has, no doubt, some difficulty in disputing the plaintiff witness testimony that Jie Shing Yin had told them that he would arrange a lawyer for them. Mr. Wan and the lady clerk who worked for the 1st defendant if called as witnesses might be able to shed some light on this matter. The defence, however, chose not to call them. In any event I do no think that this is something concocted by the plaintiff witnesses. They seem to me to be simple, straight forward and truthful witnesses. I have no hesitation in accepting what they said. The evidence of PW1 and PW2 that at Ronny Cham & Company's office no one told them that Ronny Cham was not acting for them and that no one advised them to get independent legal advice are not disputed by the defence. Clearly in the circumstances outlined by PW1 and PW2 in their evidence there is every reason for them to believe and they must have believed that Ronny Cham was also acting for them.

Defence Witnesses

The only witnesses called on behalf of the defence were the 3rd and 4th defendants. It is not in dispute that they are brothers. The 3rd defendant is the office manager of a law firm in Kota Kinabalu. The 4th defendant is the sole proprietor of the 4th defendant's law firm which prepared and witnessed the sale and purchase and loan agreements.

The 3rd defendant said that he was appointed as a director of the 1st defendants in 1981. He said he resigned only in 1988. Of the 400,000 issued shares he held 204,000 shares. He said that he held the shares in trust for Mr. Jie Shing Yin who was the beneficial owner. He said he was not involved in the running of the company and that Mr. Jie Shing Yin was the sole signatory of all the bank accounts. He said that he was aware of the Wisma Shing Yin project and that there were 24 units with an estimated value of 2.4 to 2.5 million ringgit. The reserve price for the auction was RM2,440,000 but was sold at RM1,600,884. He said that if all the units were sold the 1st defendant would have got RM2.4 million.

During cross examination, DW3 admitted that he was aware of conveyancing procedures as the law firm he worked for handled conveyancing. He said purchasers relied on what was stated in the agreement. He also admitted he knew that the title was charged but he could not remember the number of charges. He was a signatory to the charges. He also signed the sale and purchase agreement on behalf of the 1st defendants but he did not read before signing. In respect of the shares, at first he said the shares he held were not allotted to him but transferred by the 2nd defendant to him. When shown two Form 24 (exh. P4 and exh. P5) he said he did not know of the allotments in 1981 of 127500 shares and in 1982 of 204,000 shares. He denied that he acquired the shares for himself. He said that Mr. Jie Shing Yin was a foreigner and the borrowing capacity of foreign held companies was limited. That was the reason the shares were held in his name.

The 2nd witness of defence was the 4th defendant, Mr. Ronny Cham. He has been practising law since 1982. He knew the 2nd defendant, Mr. Jie Shing Yin since his student days. Mr. Jie engaged him at the early stage of the Wisma Shing Yin project and DW4's task was to prepare sale and purchase and loan agreements. There were no buyers during the construction phase of the Wisma Shing Yin project. Mr. Jie managed to secure a credit licence under the name of S.Y. Jie Credit Sdn Bhd and came out with a scheme whereby a purchaser could pay the purchase price by installment. He said he never saw the plaintiff personally. DW4's firm also acted for S.Y. Jie Credit Sdn Bhd and took action against the plaintiff sometime in 1987 for defaulting on loan installments. He said the plaintiff paid the legal fees for the sale and purchase agreement. The plaintiff was charged fees only for the developer and the financier as DW4 did not act for the plaintiff.

When questioned during cross examination why he did not tell the plaintiff that he was acting only for the purchaser, he said he was not handling the matter personally and did not know what was said to them. DW4 also said at the time he drafted the agreement he knew of the charges on the property.

He denied that the word 'the parties solicitors' as it appears in the context of cl. 6 indicate that he was acting for both parties. He said that S.Y. Jie Credit Sdn Bhd and the 1st defendant were the same as far as ownership is concerned. He said he knew of the risk to the purchaser and the end financier if the bank foreclosed the property.

Claim Against 3rd Defendant

The cause of action against the 3rd defendant is founded in tort. The plaintiff alleges fraudulent misrepresentation and/or conspiracy with the 2nd defendant to defraud/deceive the plaintiff. The pertinent averments are found in para. 19 of the further amended statement of claim:

> 19. On or about September 1985, the 2nd defendant and 3rd defendant wrongfully, maliciously, conspired and combined amongst themselves to defraud/deceive and to injure the plaintiff in the said sale and purchase and loan transaction. In pursuance and in furtherance of the said conspiracy the 2nd and 3rd defendants did the following overt acts namely:
>
> (a) on or about September 1985, the 2nd and 3rd defendants concealed from the plaintiff that the said property was charged to a third party, Sabah Bank Berhad.
>
> (b) Further knowingly and without the plaintiff's consent or knowledge caused the property to be charged to the said Sabah Bank Berhad for the sum of RM1,550,000 by a memorandum of charge dated 31 October 1986 registered under Register Memorial No. 10222958 knowing that the said action taken would prejudice the plaintiff's interest in respect of the said shop lot unit.
>
> (c) Failed, neglected, refused or omitted to redeem the said property.

In paras. 3 and 6 of the further amended statement of claim the plaintiff avers that the 1st defendant with the participation of the 3rd defendant gave warranties in respect of the alleged clean title of the said property.

Paragraph 3 reads as follows:

> In order to induce the plaintiff to make and complete the said sale and purchase agreement and to pay the said purchase price of RM170,000, the 1st defendants, through and/or with the participation of the 2nd and 3rd defendants represented and warranted to the plaintiff that:
>
> (a) they have good title to the said shop lot title.
>
> (b) the said shop lot unit is free from any trust, caveat pending action, adverse possession and any other liabilities binding the said shop lot unit.

Paragraph 6 reads as follows:

> Acting on the faith and truth of the said representations and warranties and induced thereby the plaintiff made and completed the said sale and purchase agreement and paid and or caused to be paid the said sum of RM170,000 to the 1st defendants.

It is an agreed fact that the 3rd defendant was a director of the 1st defendant company since 23rd May 1981 and was registered as having 204,000 shares in the 1st defendant company. It is also an agreed fact that the 3rd defendant was the company secretary of S.Y. Jie Credit Sdn Bhd since 19 January 1983. S.Y. Jie Credit Sdn Bhd was formerly known S.Y. Jie Sdn Bhd and the name change was effected on 19 September 1985.

Liability Of 3rd Defendant

The 3rd Defendant denies liability on the principal ground that he as a director of the company is not legally liable either in contract or tort for the acts of the company. The time honoured company law principle that a company is a legal entity with a life of its own expounded in the classic case of *Salomon v. Salomon and Co.* was invoked by the 3rd defendant. Counsel for defendants cited the case of *Abdul Manaf Mohd bin Ghows & Ors v. Nusantra Timur Sdn Bhd & Ors* [1997] 4 CLJ 437. In that case the 1st respondent company defaulted in its contractual obligations. The 2nd and 3rd respondents as directors of the 1st respondent company executed the agreement in question. It was alleged by the appellants that the 2nd and 3rd respondents undertook to assume liability personally. The Court of Appeal held that the fact that the agreement was executed by the 2nd and 3rd respondents as directors do not make them personally liable. The court cited from the following passage from the judgment of the trial judge:

> A company incorporated under the Companies Act 1965 has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only act through its directors and officers. It enters into an agreement through its directors and authorized officers. A director or an authorized officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

The Court of Appeal also held that there was no evidence that the said directors had held themselves out as personally liable and there was no evidence of any undertakings given. Counsel for defendants also cited that English case of *British Thomson-Houston Co Ltd v. Sterling Accessories Ltd* [1924] All ER Rep. 294. The headnote to the judgment in this case reads as follows:

> Even where directors are the sole directors of, and sole shareholders in, a company, in the absence of proof (which cannot be implied from their relationship with the company) that they have authorised the company to commit a tort, the company is not their agent to commit such tort so as to render them personally liable therefore.

Counsel for the 3rd defendants does not dispute that at the time of sale, the parent title as charged to Sabah Bank Berhad and the said bank in the exercise of its right as chargee sold the entire property by way of auction on 28 May 1993. However he submits that the 3rd defendant is not liable either in contract or tort. He argued that the 3rd defendant was merely acting as an agent for the 1st defendant and in an official capacity when he affixed his signature on the sale and purchase agreement. He further submitted that there is not an iota of evidence, documentary or otherwise to show that the 3rd defendant had assumed any personal obligations or liabilities in relation to the sale of the said property towards the plaintiff. He made much of the fact that the 3rd defendant never met the plaintiff or her husband in respect of the purchase of the property in question. In respect of the claim in tort, counsel for the 3rd defendant said that there was no evidence to show that he was liable. He submitted that the burden of proof is beyond reasonable doubt as the allegation of fraud concerns criminal fraud.

In arguing that the 3rd defendant was liable for fraudulent representation counsel for the plaintiff submitted that it is not true that a director of a company can never be personally liable for the wrongful acts of the company. She cited the cases of *C. Evans & Sons Ltd v. Spritebrand Ltd and Anor.* [1985] 2 All ER 415 at 420, *Rainham Chemical Works Ltd v. Belvdere Fish Guano Co. Ltd* [1921] All ER 48 at 52 H and *British Thomson-Houston Co. Ltd v. Sterling Accessories Ltd* [1924] All ER Rep. 294. Counsel for the defendants also cited the last two cases.

In *C. Evans & Sons Ltd. v. Spritebrand Ltd and Anor.* [1985] 2 All ER 415 at 420 Slade LJ at p. 419 para J said as follows:

> The mere fact that a person is a director of a limited liability company does not by itself render him liable for torts committed by the company during the period of his directorship: see for example, *Rainham Chemical Works Ltd v. Belvdere Fish Guano Co. Ltd* [1921] 2 AC 465 at 488, [1921] All ER 48 at 58 per Lord Parmoor, *Prichard & Constance (Wholesale) Ltd v. Amata Ltd* [1924] 42 RPC 63. Nevertheless, judicial dicta of high authority are to be found in English decisions which suggest that a director is liable for those tortious acts of his company which he has ordered or procured to be done.

In *Wah Tat Bank Ltd v. Chan Cheng Kum* [1975] 2 All ER 257 which cited in *C. Evans & Sons Ltd v. Spritebrand Ltd and Anor,* Lord Salmon at the Privy Council said as follows:

> A tort may be committed through an officer or servant of a company without the chairman or managing director being any way implicated. There are many such cases reported in the books. If however the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it: *Performance Right Society Ltd v. Ciryl Threatrical Syndicate Ltd* [1924] 1 KB at 14-15 per Atkin LJ. Each case depends on its own particular facts.

From a reading of the above-cited cases including the cases cited by counsel for defendants, I do not think that it can be said that a director can never be liable for the tortious acts of his company. The case of *Abdul Manaf Mohd bin Ghows & Ors v. Nusantra Timur Sdn Bhd & Ors* [1997] 4 CLJ 437 cited by counsel for defendant is not relevant as no tortious wrongdoing was alleged on the part of the directors in question. In that case the plaintiff attempted to pin the contractual liability of the company on the shoulders of the defendants who were the directors. The case therefore came clearly within the separate entity principle enunciated in *Salomon v. Salomon and Co.* It is different in the present case as the 3rd defendant here is alleged to have committed fraudulent misrepresentation and conspiracy to defraud.

Therefore the issue that arises for determination is as counsel for plaintiff submitted: whether the 3rd defendant authorised the commission of the fraudulent misrepresentation contained in the sale and purchase agreement dated 6 September 1985 between the plaintiff and the 1st defendant?

Fraudulent misrepresentation comes under the tort of deceit. The following extract from Clerk and Lindsell on *Torts* (17th edn, para. 14-01) gives a succinct description of the tort of deceit:

> The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such a representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused.

Counsel for the plaintiff submitted a strong case for inferring that the 3rd defendant authorised the 1st defendant company to commit fraudulent misrepresentation. Counsel for defendant on the other hand said that the 3rd defendant was not involved in the day to day running of the company and never met the plaintiff in this case. I have considered the testimony of the 3rd defendant very carefully and I have formed the conclusion that the fraudulent misrepresentation by the company could not have been committed

without the authorisation or connivance of the 3rd defendant. My reasons are as follows: It is common ground that the 3rd defendant signed the sale and purchase agreement in his capacity as secretary and director of the 1st defendant company. The 3rd defendant said in his testimony that he did not read what he signed. I find it difficult to believe him as he himself said that only two sale and purchase agreements were ever executed in respect of the project in question. As an educated person who is also an office manager of a law firm, I find it hard to believe that he would have neglected to read it. I am of the view that not only did the 3rd defendant knew of the false representation in the sale and purchase agreement in respect of status of the property but that he must have actually authorised the act of fraudulently misrepresenting that the said property was free of encumbrances. This is because he was the signatory to all the existing five memoranda of charges at the time the sale and purchase agreement was signed. He had said he was a director and shareholder in name only but as counsel for plaintiff pointed out his testimony shows otherwise. It is clear from his testimony he was very conversant with the business of the 1st defendant company. He knew the details of the project and his own brother DW2 gave evidence of the scheme to give loans to potential buyers through S.Y. Jie Credit Sdn Bhd. Given the lack of interest of the public in the project in view of the fact that only two purchasers came forward and the dire financial strains the 1st defendant company was heading for, it is impossible that the 3rd defendant did not know that the five existing charges were not mentioned in the sale and purchase agreement. In fact the false representation that the title was free of encumbrances could only have been made with his consent or connivance as a majority shareholder. He was after all a signatory to the sale and purchase agreement. In his evidence he said he knew that purchaser would rely on what was stated in the sale and purchase agreement.

Apart from being the majority shareholder of the 1st defendant company he was also company secretary to two other related companies namely S.Y. Jie Credit Sdn. Bhd. and Likas Supermarket Sdn. Bhd. The 3rd defendant said that he was holding the shares in the 1st defendant company as a trustee for the 2nd defendant. He said that as the 2nd defendant was not a Malaysian, the 1st defendant company would not be able to obtain loans from financial institutions if he held the majority shares because of Bank Negara rules. I find that the 3rd defendant is untruthful on this point. He also said that the shares were transferred to him as a trustee but when counsel for plaintiff showed him P4 and P5 which show that the shares were allotted to him directly he could not explain. Counsel for plaintiff challenged him during cross-examination to produce the trust deed if he held the majority shares in trust but he failed to produce it. His story that he was made a shareholder to assist

the 1st defendant company to obtain loans was also successfully challenged and shown to be fabrication by counsel for plaintiff. Counsel for plaintiff produced P110 'A' which showed that the 1st defendant company had obtained a bank loan of RM355,000 at one point earlier with no local shareholders. Counsel for plaintiff also produced evidence to show that Likas Supermarket Sdn. Bhd. obtained a loan of RM1,550,000 without any local shareholders. The 3rd defendant's only answer to this was that the transfer of the majority shares to him was to regularise the loan taken earlier. However no documentary evidence to attest to the fact of regularisation was produced. The 3rd defendant or his counsel failed to produce any Bank Negara regulation, circular or letter to support his assertion that companies without local shareholder have limited or no borrowing facility. Therefore the reason given by the 3rd defendant for his majority shareholding, I think, cannot be true.

In conclusion I find that the 3rd defendant was not a very credible witness. Clearly he was not truthful about the reason for his majority shareholding. He was also not truthful when he said that he was only a director in name and did not know about the day to day running of the company. His own brother, DW2 had intimate knowledge of the scheme to attract potential buyers and had prepared the sale and purchase agreement which promised a clean title. It is impossible that the 3rd defendant as a very interested party by virtue of being the majority shareholder and a signatory to the sale and purchase agreement would not have discussed with his brother the false representation in the sale and purchase agreement in respect of the title of the property. The only conclusion which can be drawn is that the 3rd defendant must have known that the plaintiff would act on the false representation as no reasonable purchaser would ever execute a sale and purchase agreement for a property if he or she knew that it was encumbered heavily with five memoranda of charges. The 3rd defendant himself said that as office manager of a law firm he was very familiar with conveyancing procedures. Therefore he must have intended to lull the plaintiff into a false sense of security when he signed the sale and purchase agreement on behalf of the company. His action in signing the sale and purchase agreement which promised a clean title must also be examined in light of his subsequent act in further encumbering the said property. The only inference that can be drawn is that there was never an intention to discharge the various charges and present a clean subsidiary title to the plaintiff.

I therefore am satisfied beyond reasonable doubt that the fraudulent misrepresentation was committed by the 1st defendant company with the authorisation or consent of the 3rd defendant as director and shareholder. In the circumstances the 3rd defendant, on the authority of the earlier cited company law cases should be held personally liable.

The Claim Against The 4th Defendant

The claim against the 4th defendant is found in the following paragraphs of the further amended statement of claim:

> 21. The 4th Defendants are and were at all material times a firm of solicitors carrying in their practice under the style of Messr. Ronny Cham & Co. at Suite 7CF02, 7th Floor, Block C, Komplexs Karamunsing, Jalan Tuaran, 88300 Kota Kinabalu, Sabah Malaysia, acting for both the Plaintiff and the 1st Defendants in respect of the sale and purchase transaction and the documentations of the said Shoplot unit.
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> 22. In the premises, the 4th Defendants were at all material times under a duty to exercise all due professional care, skill and diligence as solicitors in relation to the said sale and purchase transaction.

In para. 23 the statement of claim, the plaintiff alleges that the 4th defendant failed to exercise any or any due skill, professional care, diligence in or about the said sale and purchase transaction. In particular, the plaintiff alleges that the 4th defendant failed to make proper searches on the title as to encumbrances, failed to advise her to do so, failed to advise her to seek independent legal advice in respect of the sale and purchase transaction and in respect of the redemption of the property in question.

It is an agreed fact that the sale and purchase agreement and loan agreement together with the memorandum of charge in escrow was prepared by and executed in the office of the 4th defendant firm. It is also an agreed fact that the plaintiff paid the 4th defendants legal fees and stamp duty in the sum of RM2,673 for the sale and purchase agreement and memorandum of charge.

The 4th defendant's first line of defence was a technical one based on the plaintiff's pleading. The argument was that the plaintiff's claim was only for the tort of negligence and not contract. Counsel for defendant submitted that the pleading in the statement of claim shows that plaintiff is not claiming under contract. As for the claim under the tort of negligence, counsel for defendant submitted that *the plaintiff did not plead at all that he relied upon the 4th defendant to exercise the alleged duty of care and that as a result of such reliance, the plaintiff was induced to enter into the sale and purchase transaction.* It was further submitted that the plaintiff pleaded no particulars of loss and damage suffered as a result. In the premises, counsel for defendant argued that the claim against the 4th defendant is defective.

Counsel for plaintiff submitted that the claim against the 4th defendant is for damages arising from breach of duty as solicitors for the plaintiff and or arising from negligence in failing to exercise due skill, professional care and diligence. She cited the case *Neogh Soo Oh & Ors v. G. Rethinasamy* [1984] 2 MLJ 126 to support her argument that a claim against a solicitor may be in contract on the retainer of the solicitor or in tort or both.

I find that the argument of counsel for defendant that the claim of the plaintiff is only based in tort wholly unmeritorious. It is quite clear from the above authority cited by counsel for plaintiff that a solicitor may be sued by his own client either in contract on the retainer or negligence or both. A wholistic reading of paras. 21 to 23 of the statement of claim reveal quite clearly that the plaintiff is suing in contract on the retainer and in tort. Paragraphs 21 and 22 state that the 4th defendant acted for both the plaintiff and 1st defendant and that he failed to exercise due professional care, skill and diligence as solicitors in relation to the said sale and purchase transaction. This is a clear averment that the 4th defendant had a contractual relationship with the plaintiff and that he had breached the terms of the said contractual relationship. Therefore I do not think that there is any merit in counsel for defendant's submission that the pleadings only reveal a cause of action in tort.

Whether 4th Defendant Acted As Solicitor For The Plaintiff

The 4th defendant denied that he acted for the plaintiff. He said in his testimony that he only acted for the 1st defendant and its related company, S.Y. Credit Sdn. Bhd. He therefore owes no duty of professional care, skill and diligence to the plaintiff.

The plaintiff on the other hand has pleaded that the 4th defendant acted for her and therefore he is liable in contract for breach of duty as a solicitor. She said the 2nd defendant told her he would arrange a lawyer for her and that she was asked to go to 4th defendant' firm later. She said the sale and purchase agreement stated that the 4th defendant acted for her as well. Clause 6 of the sale and purchase agreement provides as follows:

> Upon the signing of this Agreement, the Developer shall execute a memorandum of transfer and all other related transfer documents for the purpose of transferring the said unit to the Purchaser and such transfer documents shall be kept by the parties solicitors Messr Ronny Cham & Co. as stake holders pending the issue of subsidiary title to the said unit.

She also paid the 4th defendant the sum of RM2,673 in legal fees and stamp duty. This is not disputed.

I am inclined to conclude that the the 4th defendant acted or at least purported to act as solicitor for the plaintiff. Although there is no written evidence to support a retainer between the plaintiff and the 4th defendant, I agree with counsel for plaintiff that from the facts of the case, the existence of a retainer can be implied. In *Halsbury's Laws of England*, 3rd edn, vol. 36 at para. 87 it is stated that a retainer can be implied from the acts of parties in a particular case. In *Dato' Seri Au Ba Chi v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 which was also cited by counsel for plaintiff, the High Court approved the following passage from the judgment of Scott LJ in *Groom v. Crocker* [1938] 2 All ER 394:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means.

I think that the facts of this case warrant an implied retainer for the following reasons. The plaintiff had been asked to by the 2nd defendant to go to the firm of the 4th defendant on the assurance that the 4th defendant was her lawyer. Of course this is an assurance given by the 2nd defendant not the 4th defendant. However the conduct of the 4th defendant once she arrived at his office and the way the sale and purchase agreement was drafted leaves no room for any conclusion but that the 4th defendant acted for the plaintiff or had deliberately given her the impression that his firm was acting for her as well as the 1st defendant. The 4th defendant was aware when the plaintiff called on his office to sign the sale and purchase agreement that no other lawyer was acting for the plaintiff. His firm drafted the sale and purchase agreement which contained cl. 6 which referred to his firm as the parties solicitors. The 4th defendant asked the plaintiff to pay the conveyancing fees and stamp duty and accepted the payment thereof. The sole proprietor of the 4th defendant, Mr. Ronny Cham told the court that the agreement provided that the purchaser pay the legal fees. It may well be so that the fees were paid by the plaintiff under the terms of the contract. However the conduct of the 4th defendant in not telling the plaintiff that he was only acting for the 1st defendant and not looking out to protect her interest in the transaction had clearly lulled the plaintiff into a false sense of security. The 4th defendant said the fees payable by the plaintiff would have been higher if he had also acted for her in the conveyance. However it is a point to be noted that at no time was this fact communicated to her. If she had been told she could have agreed to pay higher fees to protect her interest or could have engaged another solicitor to look out for her interest. Therefore as far as the plaintiff was concerned she had engaged the 4th plaintiff to look out for her interest. Counsel for the 4th defendant had in the course of submission made much of cl. 11 of the sale and purchase agreement to argue that the 4th defendant was the solicitor of the 1st defendant. Clause 11 reads as follows:

> All documents required to prepared under the Agreement for the transfer of the said unit to the Purchaser and for attending to the stampling and registration shall be prepared and undertaken by the Developer's solicitor but all stamp duty and other legal costs and fees shall be borne by the Purchaser.

I think that this clause is vague and not specific as to the identity of solicitor engaged by the 1st defendant. This is to be compared to cl. 6 which specifically and unambiguosly identifies the 4th defendant (Ronny Cham and Co) as the solicitor for the parties. Therefore I do not think cl. 11 detracts from the clear meaning of cl. 6. Even if one were to view that both these clauses are inconsistent with each other, the *contra proferentum* rule should be made to apply against the 4th defendant on ground of ambiguity. I also agree with counsel for plaintiff that the 4th defendant is estopped from denying that he had acted for the plaintiff as he had contrived to give that impression to the plaintiff. As to the argument that estoppel was not specifically pleaded, there are cases where estoppel although not pleaded was nevertheless applied in the interest of justice, (see *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283).

Whether 4th Defendant Breached Duty As Solicitors For The Plaintiff

The plaintiff has contended that the 4th defendant has breached his duty as solicitors to exercise all reasonable care and professional skill to protect her interest in the sale and purchase transaction. Their duty would have been to ensure that the title to the property the plaintiff bought was transferred to her free from encumbrances except for the charge in favour of S.Y. Jie Credit Sdn. Bhd. which provided the loan for the purchase. The standard of expertise and care required of a professional in any discipline is generally the standard adopted by his profession. In *Midland Bank Trust Co Ltd & Anor Hett, Stubbs Hett & Kemp (a firm)* [1978] All ER 582, Oliver J stated as follows:

> The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received ...
>
> The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession ...

PW4 gave unchallenged expert testimony as a solicitor specialising in conveyancing about prevailing procedures adopted in sale and purchase agreements involving developers. He said that if he were to act for the developer, his firm would inform the purchaser that they are only acting for the developer as otherwise the purchaser would assume that his firm was also acting for the purchaser as the purchaser would be paying the legal fees. He would also ask to see the title deed and all plans and corporation particulars of the developer before drawing up the sale and purchase agreement. Lastly if he were also the solicitor for the end finance loan he would carry out redemption agreements with existing chargee of the subject land. It is quite

clear in this case that the 4th defendant breached the duty of care and skill ordinarily required of a solicitor in his position. If he was only acting for the developer, he failed to advise the plaintiff of that fact. He failed to inform her that the master title was heavily encumbered with five charges and that the representation in the sale and purchase agreement that the title was clean was patently false. The 4th defendant also acted for the end finance loan between the S.Y. Jie Credit Sdn. Bhd. and the plaintiff and in this transaction he failed to carry out the standard redemption agreement with the existing chargee and thereby exposed the plaintiff to the risk of losing the property in the event of foreclosure. Counsel for defendant argued that there was no need to carry out the redemption procedure as the end financier was also owned by the same person as the developer. I think that fact should have afforded a more compelling reason to carrying out redemption procedures because as the end financier and the developer could collude in letting the subject land go under the hammer once the end financier had collected sufficient instalments in respect of the loan. In this case, as happened the developer further encumbered the subject land after the execution of the sale and purchase agreement. The standard of care required of the 4th defendant was definitely high in this case as he acted for parties with competing interest. In *Muoat v. Clark Boyce* [1992] 2 NZLR 559, a New Zealand Court of Appeal case, where a solicitor who acted for both son and mother in a mortgage transaction was held to be liable in tort and contract to the mother, Cooke P said as follows:

> ... At some point a contract was made but it did not convert the duty into one arising only in contract. ... In this case their fiduciary content was governed by the fact that he ought to have known that there was an acute conflict of interest. In such a situation a solicitor who undertakes has been called by Tipping J the tightrope responsibility of acting for two or more parties does not act reasonably unless he takes most scrupulous precautions.

In this context the rules governing the ethics of the legal profession are relevant. Rule 5(a) of the Sabah Advocates (Practice and Procedure) Rules 1988 (G.N.S. 16 of 1988) provides as follows:

> No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

In the local case of *Ex parte Vicnandan Maria Dass* [2000] 3 CLJ 808, Hishamudin Yunus J cited the above equivalent provision of the Legal Profession (Practice and Etiquette) Rules 1978 to dismiss an application by the administrator of the estate of his father to transfer a piece of land to a buyer who had signed a sale and purchase agreement with the executor on the ground that the same solicitors acted in the sale and purchase transaction and the instant application to transfer the land pursuant to the sale.

Nonetheless in the instant case, the 4th defendant proceeded to act for the developer and end financier without any regard whatsoever for the interest of the plaintiff. Therefore I find the 4th defendant in breach of his duty as solicitor to the plaintiff under the terms of the implied retainer in the sale and purchase transaction.

Whether 4th Defendant Also Liable In Tort

Even if I were to hold that a retainer cannot be implied, I think that given the facts of this case, the 4th defendant cannot escape liabilty under tort.

In the case of *H.L. Hedley Byrne & Co. v. Heller & Partners* [1963] 2 All ER 571 the liability of a professional person apart from the confines of a contract for services was debated at length in the House of Lords. The following statement of principle extracted from the headnote is distilled from the opinions of the five law lords in that case:

> If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man asked would know that he was being trusted, or that his skill judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results.

This case imposes a burden of care on a professional person quite independent of contract for negligent or untrue statements. In the instant case the plaintiff relied on the sale and purchase agreement drafted by the 4th defendant that stated the property was free from encumbrances. I think the plaintiff was entitled to rely on the representation in the agreement as the 4th defendant was an experienced law firm handling property conveyancing. It is immaterial whether 4th defendant acted for the plaintiff as well. The representation was false and the plaintiff suffered loss. If the 4th defendant had not falsely stated that the title to the property was clean when in fact it was heavily encumbered, it is probable that the plaintiff would not have proceeded to execute the agreement. I therefore think that the 4th defendant is liable on this ground alone.

I also think that the 4th defendant is also liable in tort under the neighbour principle enunciated in *Donoghue v. Stevenson* [1932] AC 562 for which reliance on false or negligent statement is not a requirement. In *Ross v. Caunters* [1979] 3 All ER 3rd edn 580, which was cited by counsel for

plaintiff, a testator had instructed his solicitors to draw up a will and send it to the beneficiary's house where he was staying. The solicitor did so but failed to warn the testator that the benefiary's spouse cannot attest the will under Wills Act 1837. The beneficiary's spounse attested the will and returned it to the solicitors who failed to notice it. The beneficiary was not able to claim under the will and he sued the testator's solicitors for negligence. The solicitors admitted negligence but argued they are only liable to their client and that only in contract and not tort. Sir Robert Megarry V-C at the Chancery Court rejected this argument and held that a solicitor can be liable to a third party in tort. The court found that there was a sufficient degree of proximity between a solicitor and the identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitors reasonable contemplation that his acts or omissions in carrying the instructions would be likely to injure the third party. Megarry V-C said at p. 591-G as follows:

> ... once it is held that the solicitor owes a duty of care to the beneficiaries, the loss to them is directly caused by the solicitor's breach of that duty, and reliance by the plaintiff is irrelevant. If the duty of care is imposed on what I may call pure *Donoghue v. Stevenson* principles, and the loss occurs without being dependent on any reliance by the plaintiff, then I cannot see how the presence or absence of reliance by the plaintiff can affect liability.

In the instant case I hold a duty of care arose as 4th defendant knew that the plaintiff was unrepresented and that the transaction was fraught with risks to the plaintiff as the property was heavily charged. The 4th defendant should have advised the plaintiff to get another solicitor or at the very least explained the risks involved as the property was encumbered. In *Letchemy Arumugam v. Annamalay* [1982] 2 MLJ 198, where solicitor in question acted for both parties, the court said as follows:

> Where a party, especially an ignorant or illiterate one, is unrepresented by an advocate and solicitor in a transaction and the opposite party is represented by one, it is the duty of the advocate and solicitor to explain the terms and conditions of the contract and the legal consequences thereof fully and frankly to the unrepresented party and ensure that this unrepresented party understands the terms and conditions and legal consequences fully, so that neither of the contracting parties has any unfair advantage over the other.

Of course, in the instant case, the 4th defendant not only did not explain the risks involved but misrepresented status of the title to the property.

I also find the 4th defendant negligent in another way. The 4th defendant as solicitor for the end financier did not seek to protect the interest of the end financier by procuring a redemption agreement with the chargee of the property for the reason that the end financier is also owned by the 1st defendant

developer. PW4 had given unchallenged evidence that the standard conveyancing practice was for the solicitor acting for the end financier to protect the end financing loan by making a redemption agreement with the chargee of the property. This is because in the event of foreclosure by the chargee, the interest of the end financier and the interest of the house purchaser would be safeguarded. Even assuming that the 4th defendant only acted for the developer and the end financier, I still hold that the 4th defendant is liable as he should have known that his ommission in securing the redemption agreement on behalf of the end financier would directly cause a loss to the plaintiff.

In concluding this part of the case, I must perforce observe that the manner the transaction in this case was handled by the 4th defendant may very likely undermine public confidence in the legal profession.

Lastly I must consider the argument raised by counsel for 4th defendant that they were wrongly cited as a firm. Counsel for 4th defendant stated as follows in his written submission:

> The 4th Defendant is duty bound to point out to Your Lordship that the 4th Defendant, namely, Ronny Cham & Co. is technically, under the Rules of High Court 1980, not a legal entity capable of being sued as a firm in its firm's name. The plaintiff has sued a technically wrong party.

I find no merit in this argument as Rules of the High Court 1980 permit suing of a firm, whether a sole proprietorship or a partnership although it may not be a legal entity. Order 77 r. 9 reads as follows:

> An individual carrying on business within the jurisdiction in a name or style other than his own name may be sued in that name or style as if it were the name of a firm, and rules 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm.

Halsbury's Laws of Malaysia, vol. 1 says as follows:

> (10.3-038) **Partnerships and firms** Two or more partners carrying on business within the jurisdiction may sue or be sued in the name of the firm, if any, of which they were partners at the time when the cause of action accrued.[1] This procedural provision does not in any way alter the substantive law that a firm has no legal existence[2]...
>
> (10.3-039) **Sole proprietorships** An individual carrying on business within the jurisdiction in a name or style other than his own name may be sued in that name as if it were the name of a firm,[1] but he may not sue in his trade name.[2]

In the premises there will be judgment for the plaintiff against the 3rd and 4th defendants in the sum of RM208,587 with interests of 8% from date of judgment to date of payment. Costs awarded to the plaintiff.